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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROLL INTERNATIONAL CORP., et al., Cross-complainants and Appellants, v. UNILEVER UNITED STATES, INC., et al., Cross-defendants and Appellants.	B168206 (Los Angeles County Super. Ct. No. BC243968)

APPEAL from judgments of the Superior Court of Los Angeles County, Marilyn L. Hoffman, Judge. Affirmed.

Loeb and Loeb, Andrew S. Clare and Lawrence B. Gutcho, for Cross-complainants and Appellants.

Horvitz & Levy, Frederick D. Cohen, S. Thomas Todd; Gibson, Dunn & Crutcher, John H. Sharer, Dean J. Kitchens and Brett H. Oberst, for Cross-defendants and Appellants.

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INTRODUCTION

Appellants Unilever United States, Inc. and Conopco, Inc. (collectively Unilever) appeal from a judgment in favor of Roll International Corporation and Paramount Farms, Inc. (collectively Roll), based on a jury verdict finding that Unilever breached the implied covenant of good faith and fair dealing in a settlement agreement with Roll. Roll appeals from the judgment on special verdicts by which the jury found against Roll on its claim for fraud against Unilever.

Roll had purchased the Sunkist Fruit Roll business (fruit roll business or business) from Unilever. Roll sued Unilever over the transaction. To settle that action, the parties entered into a settlement agreement whereby, inter alia, they were jointly to sell the fruit roll business and share the proceeds equally. Unilever filed another action against Roll contending that Roll breached the settlement agreement and fraudulently induced Unilever to enter into that agreement. Roll cross-complained, alleging breach of the settlement agreement, breach of the implied covenant of good faith and fair dealing, fraud and negligent misrepresentation. After the business was sold and Roll paid Unilever half the proceeds of the sale, Unilever dismissed its complaint. On the cross-complaint, the jury found Unilever liable for breach of the implied covenant of good faith and fair dealing and awarded Roll $3.6 million. The jury specifically found that Unilever did not prove that Roll failed to satisfy its duty to mitigate. The jury did not find for Roll on its fraud claims.

Unilever contends that the jury's finding against it was not supported by substantial evidence as to the breach, causation of damages, and various defenses, including Roll's failure to mitigate and Roll's breach of the agreement. Unilever also asserts that Roll's ultimate payment of proceeds of the sale constituted a judicial admission that Unilever had no liability. Roll appeals from the denial of its fraud claim on the grounds that the trial court erred in precluding Roll from introducing certain evidence of Unilever's ill will towards Roll and in instructing the jury that they were permitted to find Unilever liable either for breach of contract or for fraud, but not for both.

We hold that there was substantial evidence to support the jury's findings, that either there was no judicial admission that barred Roll's claim or that defense was forfeited, that the trial court did not abuse its discretion with regard to excluding evidence on the fraud count, and that any error in admitting evidence or on an instruction did not constitute a miscarriage of justice.

FACTS AND PROCEEDINGS

Roll purchased the fruit roll business from Unilever in 1995. In 1996 Roll sued Unilever over the transaction. In August 1999, the parties reached a settlement that was incorporated into an August 3, 1999 settlement agreement. Under that settlement agreement, Unilever paid money to Roll, and the parties agreed that Roll and Unilever "will jointly sell the Fruit Roll business and share the proceeds equally. They will cooperate in good faith to agree to an appropriate sale procedure." Roll's owner, Stewart Resnick, had told Unilever's representative, Richard Goldstein, that the fruit roll business was losing money and should be sold quickly. Goldstein assured him that Unilever would cooperate and act quickly in the sale.

Robert Kors, along with Jerry LaFleur, represented Roll in connection with the joint sale efforts, and Martin Laius worked on the matter for Unilever. Because the parties were engaged in "another matter" (although not disclosed to the jury, it was the trial of the action to rescind the 1995 purchase agreement), the parties did not begin the efforts to sell the business until early September 1999. Roll transmitted financial and descriptive materials on the fruit roll business to Unilever in late September 1999. The information showed losses for the 1996-1999 fiscal years, but a projected profit ("preliminary budget") for the year ending August 31, 2000.

As requested by Unilever and acquiesced in by Roll, the parties were to use an investment banker to help sell the business. Roll notes that Unilever did not use an investment banker in 1995 to sell the fruit roll business to Roll. They interviewed various investment bankers and ultimately decided to retain Schroder & Co., Inc., which at some point became Salomon Smith Barney (Schroders). In October 1999, the parties sent information about the business to Schroders. The key person at Schroders working on this matter was Mark Francis.

Because Laius was unavailable, the first meeting at Roll's fruit plant among representatives for Roll, Unilever and Schroders did not take place until January 2000. During the meeting Schroders provided a preliminary timetable for the sales process, and they discussed Schroders's engagement letter. Unilever provided its comments for the engagement letter with Schroders, which letter was signed thereafter. Beginning in February 2000, Schroders produced a number of drafts of the proposed offering memorandum, which was finalized in June 2000. During this time Roll provided Schroders additional data, including ultimately a projection for purported losses for the fiscal year ending August 31, 2000. Apparently, Schroders also sent some material on the fruit roll business to potential buyers during April and May of 2000—so-called "teaser" materials. In June 2000, Schroders sent the completed offering memorandum to possible buyers.

Roll contends that Laius was unavailable to work on the matter for a lengthy period because he was working on other large Unilever acquisitions and that he "apologized for being busy on the Slim Fast and Ben and Jerry's acquisitions [by Unilever]." Roll also states that Francis, the key Schroders investment banker, did no work on the matter until the engagement letter was signed, and that signing was delayed by the inaction of Unilever. Unilever contends that Schroders's personnel worked on the project before the engagement letter was signed and reported to Francis and that Laius did communicate with Schroders during this period.

In early July 2000, Schroders reported to Roll and Unilever that it was unable to find a buyer for the fruit roll business as a going concern. The parties disagree over what transpired next, but liquidation was discussed. Roll solicited proposals from liquidators. The parties had a dispute. Roll took the position that the agreement contemplated the sale of the business as a going concern—not on a liquidated basis—and that therefore

Unilever should pay half the costs of shutting down the business and selling the assets and that Unilever should pay for certain operating expenses, or that Unilever was not entitled to half the proceeds of the sale of the business if it was not a going concern. Unilever disagreed with these contentions. Roll claimed that it was reluctant to liquidate the business without the express authorization of Unilever, which it did not have. Unilever states it urged Roll to liquidate. Roll did explore liquidation possibilities, but nothing materialized. It was determined that because of the dispute, Resnick of Roll and Goldstein, who had left Unilever, should meet. Unilever was to give Goldstein authority. Goldstein did not communicate with Resnick for a lengthy period, and when he did, he said he had no authority and that Roll should accede to Unilever's demands. Thus, Roll kept operating the business despite losses.

In January 2001, Unilever sued Roll for breach of the settlement agreement and for fraudulent inducement. Unilever alleged that Roll breached its obligations to participate in a joint sale of the business by demanding that Unilever pay one half of operating losses and for certain investments in the business. Unilever also alleged that Roll fraudulently induced Unilever into entering into the settlement agreement.

Roll cross-complained, alleging breach of the settlement agreement, breach of the implied covenant of good faith and fair dealing, fraudulent misrepresentation, fraudulent concealment and negligent misrepresentation. Roll alleged that in breach of the implied covenant of good faith and fair dealing in the settlement agreement, Unilever failed and refused to move forward promptly in selling the business and to bear its share of the costs incurred in connection with the sale, which costs included short term operating losses and capital expenditures necessary to maintain the business as a going concern. Roll also alleged that Unilever fraudulently induced Roll to enter into the agreement by concealing that it was going to sell hundreds of other food-related businesses, thereby necessarily delaying and inhibiting the sale of the fruit roll business,[1] and that Unilever never intended to pay Roll its share of costs associated with the sale of the business.

Roll announced its intention to shut down the fruit roll business in March 2001 and did so on April 27, 2001. By then, Roll was actively involved in attempting to sell the business or the assets of the business. In November 2001, Roll sold the assets of the fruit roll business to a company in Mexico.

Prior to the trial, Roll paid Unilever one half of the proceeds from the liquidation sale. Unilever dismissed its complaint for declaratory relief and ultimately informed the court that its complaint would not be tried. The jury trial proceeded on the cross-complaint. Roll requested $13.5 million in damages, including $9.9 million of operating losses. The jury found that Unilever breached the covenant of good faith and fair dealing in the settlement agreement and awarded Roll damages of $3.6 million. The jury also found that Unilever did not make false promises to Roll.

Unilever filed a motion for judgment notwithstanding the verdict, which the trial court denied. Unilever filed a timely appeal from the judgment, and Roll cross-appealed.

DISCUSSION

A. Standard of Review

"When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) "[W]e are bound by the rule that when 'a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or

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[1] Evidence related to portions of this divestiture program were stricken.

uncontradicted which will support the finding of fact.'" (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503.) "Trial court findings must be supported by substantial evidence on the record taken as a whole. Substantial evidence is not any evidence—it must be reasonable in nature, credible, and of solid value." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51.)

We review de novo pure issues of law not involving resolution of disputed facts. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.) "Alleged instructional error is reviewed under the prejudicial error standard. Under this standard, the judgment is affirmed unless appellant can show an error that was so prejudicial a miscarriage of justice occurred." (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 306.) "Thus, when the jury receives an improper instruction in a civil case, prejudice will generally be found only "'[w]here it seems probable that the jury's verdict may have been based on the erroneous instruction . . . .'"" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

"Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) "This standard of review applies to a trial court's determination of the relevance of evidence, as well as to whether the evidence's probative value is substantially outweighed by its prejudicial effect." (*People ex rel Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639; *Akers v. Miller* (1998) 68 Cal.App.4th 1143, 1147.)

B. Substantial Evidence Supporting the Judgment

Unilever asserts that there is not substantial evidence to support the jury's verdict that Unilever breached the implied covenant of good faith and fair dealing in the settlement agreement or to support the jury findings that any such breach proximately caused Roll to sustain damages and that Roll did not fail to mitigate its damages. In accordance with the standard of review applied to determining whether there is substantial evidence supporting findings of fact, we view and state "the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

1. Breach of the Implied Covenant of Good Faith and Fair Dealing

(a) *Implied Covenant*

There is no dispute that there is implied in the agreement a covenant of good faith and fair dealing not to do anything "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55 (*Storek*).) This would include performing without undue delay. (See *Okun v. Morton* (1988) 203 Cal.App.3d 805, 820.)

The agreement provides that the parties "will jointly sell the Fruit Roll business and share the proceedings equally. They will cooperate in good faith to agree to an appropriate sale procedure." Resnick testified that in connection with making the agreement, "I told him [Goldstein of Unilever] that I didn't think the Fruit Roll business had much value and that it was losing money and I would go along with it [the agreement] as long as they would act quickly and be cooperative in the sale, and he assured me they would be." He said without this assurance, he would not have proceeded with the agreement. Goldstein did not testify. Thus, Resnick's testimony was unrebutted. There was also testimony that once a business is put up for sale, it is desirable to sell it quickly. This is to minimize the risk of the business declining while it is for sale and to avoid employee and customer defections that might take place once it is known that the business is for sale.

According to Kors of Roll, Laius of Unilever "said that he [Laius] wanted to be actively involved in all parts of the process of jointly selling the business." And Unilever did find an investment banker and participated in the agreement with the investment banker and in formulating the offering circular. Unilever wrote to Roll at a later point that, “we expect that Roll will keep Unilever informed of any offers that Roll receives for the purchase of the Fruit Roll business. Unilever and Roll may then evaluate the terms and conditions of each of those offers and jointly determine the highest and best offer to accept.” Laius testified that Roll could not act unilaterally.

(b) *Breach of the Implied Covenant by Delay*

“The question whether a duty to act in good faith should be implied must be distinguished from the question whether a covenant of good faith that is implied has been *breached*.” (*Storek, supra,* 100 Cal.App.4th at p. 61, fn. 13.) “The Supreme Court has said that the implied covenant of good faith and fair dealing has both a subjective and an objective component—subjective good faith and objective fair dealing. ‘A party violates the covenant if it subjectively lacks belief in the validity of its act *or* if its conduct is objectively unreasonable.’ (*Carma [Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992)] 2 Cal.4th [342] 372, italics added.) ‘[T]he covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor’s motive.’ (*Id.* at p. 373; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 796 . . . .)” (*Storek, supra,* at pp. 61-62, fn. 13.) Thus, “two different tests are recognized: (1) the party may make a purely subjective decision but it must be made in good faith; or (2) the party must make the decision in accordance with an objective standard of reasonableness.” (*Storek, supra,* 100 Cal.App.4th at pp. 58-59.)

It is not disputed that unreasonable delay in participating in efforts to sell the business would be a violation of the implied covenant of good faith and fair dealing. Roll’s contention, in effect, is that Unilever’s conduct suggested that Unilever made a subjective decision in bad faith to allow the matter to be delayed and that its conduct was not objectively reasonable.

The agreement was executed on August 3, 1999, and implementation of the sale provision was necessarily delayed a month because of the mutual participation of the parties in another matter that was part of the same agreement. Thus, the joint effort to sell the business began in early September, 1999. Schroders, the investment banker selected by Unilever, contacted Roll in late October, 1999. There is evidence that Laius was not available to meet with Roll and the Schroders's representatives until January, 2000.

It took until April, 2000 for Laius to provide his final comments on the Schroders's engagement letter, which delayed the participation of the person in charge at Schroders. Laius was difficult to reach and "apologized for having been busy on the Slim Fast and Jerry's acquisitions." During the 1999-2000 period Laius was working on the $325 million acquisition of Ben & Jerry's, the $2.3 billion acquisition of Slim Fast and the $23 billion Best Foods acquisition.

By July, 2000, Schroders advised the parties it could not sell the Fruit Roll business. Kors denies that Laius told him or authorized Roll to liquidate the company. According to Kors, Laius told him he did not want Roll to continue to own the business because it would reflect badly on him if it stopped losing money. A dispute erupted as to what would occur upon liquidation. There is some disagreement over what was said.

There are suggestions that Roll took the position that the agreement was to sell a going concern and that if it was liquidated, Unilever should pay half the costs of shutting down the business and selling the assets. It was agreed that Goldstein, who had left Unilever, and Resnick should talk in an effort to resolve the impasse. Goldstein, who was no longer at Unilever, was to be authorized to represent Unilever. He was suppose to contact Resnick, but Goldstein did not make contact with Resnick for months—until January of 2002—and then when he did, he said that he had no authorization from Unilever and that "these people [at Unilever] are kind of upset and they're going to sue you so I would suggest . . . just go along with whatever they want." Unilever sued Roll before the assets were sold. Even then, Laius demanded that no liquidation offers be accepted until Unilever had an opportunity to "evaluate the terms and conditions." All of this evidence constitutes substantial evidence that Unilever failed to cooperate in good faith to sell the fruit roll business.

Although there was contradictory evidence supplied by Unilever that there were no significant delays and that any delay was attributed to Roll,[2] any factual conflicts must be resolved in Roll's favor. (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 507, overruled on another ground by *Privette v. Superior Court* (1993) 5 Cal.4th 669, 702, fn. 4). Substantial evidence supports the jury's findings that Unilever breached the agreement.

(c) *Causation and Damages*

That any breach of the implied covenant of good faith and fair dealing caused Roll damages is also a requirement of recovery. Unilever contends that Roll has not shown that it could have sold the business any earlier than it did. Roll contends that it "kept the business open for eighteen months after executing the Settlement Agreement because Unilever's bad faith conduct delayed the process of reaching closure." As the company was losing money, Roll attributes the losses to Unilever. Roll says that it could not shut down the business while Schroders was attempting to sell it, and there is no evidence suggesting that Roll should have shut down the business during that period.

There was sufficient evidence from which the jury could have concluded that had matters proceeded more quickly, the business either could have been sold or an earlier determination made that it could not be sold, so that it could have been shut down earlier or so that a liquidation sale could have occurred earlier. Unilever contends that in June, 2000, after Schroders said the business could not be sold, Roll should have shut it down then instead of continuing to incur losses. But there is evidence that Roll could not shut the business down without the approval of Unilever, that Unilever had not agreed to a liquidation sale, that a dispute arose between the parties and that Unilever failed to

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[2] Unilever states that work on the sale continued even without the Schroders engagement letter and when Laius was not available. It also points to Roll's role in providing information, Roll's changing forecasts of the financial situation of the business, and Roll's unjustified demands.

address the matter in a timely fashion. Accordingly, there was substantial evidence of causation.

Roll submitted evidence that its operating and non-operating losses amounted to over $13 million. Even if one were to disregard the non-operating losses of $3.4 million, and some months that generated a portion of the $9.9 million in operating losses, there is substantial evidence to support the jury award of $3.6 million. (See *Contra Costa Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 905 ["it is within the province of the trier of fact to reconcile conflicting testimony when presented with wide discrepancies in the estimates of value and damage by witnesses for each side"].)[3]

2. Unilever's Defenses

(a) *Failure to Mitigate*

The jury expressly found that Roll did not fail to mitigate its damages. Roll submitted evidence that Unilever did not instruct Roll to liquidate earlier than it did and that Roll was justified in not liquidating earlier. This constitutes substantial evidence supporting the jury's conclusion.

(b) *Breach by Roll and Unclean Hands*

Unilever contends that Roll breached the settlement agreement by refusing to shut down the business and sell the assets upon being told that Schroders could not sell the business as a going concern, and by insisting that Unilever pay half of Roll's operating expenses from August 3, 1999 and half the costs of shutting down and selling the assets. The jury was instructed that Roll's performance was an essential element of its claim and that Unilever had an unclean hands defense. The jury found Unilever liable for breach of the implied covenant of good faith and fair dealing and thereby rejected any contention

[3] At oral argument, Unilever contended it was only contesting liability and not the amount of damages.

that Roll had breached its obligations. Moreover, the jury, in the special verdict form, found that Roll did not have unclean hands. Whether Unilever's argument is considered as a defense not raised below or an element of Roll's cause of action—performance—there is substantial evidence that Roll performed its responsibilities. There is evidence that Unilever did not instruct Roll to shut down, that Roll had justifiable concerns about acting unilaterally, and that it was Unilever that caused the delay by not communicating with Roll—even if there was a dispute. There was conflicting evidence as to what occurred immediately after it was determined that the business could not be sold as a going concern. Even if Roll had taken a legally unjustified position, the evidence of the failure of Unilever's representative, Goldstein, to meet with Roll as agreed, to resolve any differences, was substantial evidence rebutting any claim of breach by Roll or of Roll's unclean hands.

C. No Judicial Admission

Unilever contends that Roll's payment to Unilever of half of the proceeds of sale and statement in court that Unilever was entitled to that payment without deductions constituted a judicial admission as to the lack of merit of Roll's demand in July or August of 2000 that Unilever was responsible for operating expenses and costs in selling the business. According to Unilever, Roll thereby admitted that its demand lacked merit and constituted a breach of the agreement that excused any alleged non-performance by Unilever. Unilever argues that Roll, in effect, judicially admitted that Unilever was not liable to Roll for all or some of the alleged delay damages.

This *theory* was never raised at the trial level and therefore cannot be asserted on appeal. (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 920.) The trial court should be presented with the opportunity to declare a judicial admission. (See Roman, "*Your Honor What I Meant to State was . . .": A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law* (1995) 22 Pepperdine L. Rev. 981, 988 [courts have discretion to accept or reject a statement as a judicial admission].) But even if we were to consider the matter, the actual damages claimed are for operating losses for delay. That Roll ultimately paid the full amount of half of the proceeds of sale is not an admission that it was not entitled to such delay damages. It is difficult to conceive that by paying the monies to Unilever causing Unilever to dismiss its action, Roll admitted that it had breached the contract, thereby relinquishing its claims. Judicial admissions should not be inferred from such an equivocal act. (Cf. *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 961-963.)

D. Roll's Claim For Fraud

1. Evidentiary Ruling

Roll claims that the trial court erred by not admitting evidence of Unilever's ill will towards Roll, from which it might be inferred that Unilever did not intend to perform its promises in connection with the sale of the business. Roll suggested that this evidence of Unilever's motive helped establish that Unilever did not intend to perform its contractual obligations.

The trial court ruled that the value of the evidence concerning the prior dealings and litigation between the parties was substantially outweighed by its prejudice—referring specifically to Evidence Code section 352. The trial court exercised its discretion, and we hold that there was no abuse of discretion. Although ill will might indicate some improper intent, in this case, the trial court could reasonably conclude that the evidence of the prior dealings between the parties that resulted in large judgments against Unilever could cause prejudice that would far outweigh any connection between ill will and an intention not to perform a settlement agreement.

Moreover, even if the evidence was improperly excluded, there was no miscarriage of justice (Evid. Code, § 353). Although there is substantial evidence to show that there was a breach of the implied covenant of good faith and fair dealing, there is also substantial evidence to the contrary. That Laius may have been too busy to engage in the sale procedure in a timely fashion—a debatable point—does not suggest he *intended* to delay the sale. Unilever should have been motivated not to delay the sale because it would receive half of the proceeds. Thus, any error did not result in a miscarriage of justice.

2. Alleged Instructional Error

Roll claims that the trial court erred by instructing the jury that they were to find either "1. Unilever is liable on Roll's breach of contract claim; or 2. Unilever is liable on Roll's fraud claim." Roll argues that the instruction provides that if Unilever was liable for breach of contract, it could not be held liable for fraud.

The instruction was intended to prevent recoveries for both breach of contract and fraud. The jury, however, could have found Unilever liable for both fraud and breach of contract, but could not duplicate the damages. It could have awarded damages for one or the other and punitive damages for the fraud claim. So the instruction was questionable. Roll did not object to it. Whether this was an erroneous instruction at law that obviates the necessity to object at trial (*Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7) or whether it is legally correct but is """too general, lacks clarity, or is incomplete."""
(*id.*) is not clear. But we do not have to resolve that issue because even if the instruction was erroneous, it constituted harmless error.

As we have noted above, the fraud claim was not particularly strong. The jury specifically answered "yes" to the question on the special verdict form "[A]t the time Unilever made the promise, did Unilever intend to perform it"? It also answered "no" to the question on the special verdict form "[D]o you find by CLEAR AND CONVINCING EVIDENCE that defendant Unilever was guilty of fraud in the conduct upon which you base your finding of liability"? This was in the punitive damage special verdict form that the jury did not have to complete because it found no fraud, but it did so anyway. Thus, even had the instruction been given and even if the jury had found fraud, it would not have awarded punitive damages. Roll's fraud and punitive damages claims were rejected by the jury. The instruction, even if erroneous, did not result in a miscarriage of justice.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

ARMSTRONG, J., Acting P.J.

KRIEGLER, J.*

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* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.